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No. 641

In the Supreme Court of the United States

OCTOBER TERM, 1959

DAVID LASH, TREASURER, DAVID'S, INC., PETITIONER

v.

LAURENCE A. NIGROSIAN, REVENUE AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	5
Argument	8
Conclusion	10

CITATIONS

Cases:

Boren v. *Tucker*, 239 F. 2d 767 8

Brody v. *United States*, 243 F. 2d 378, certiorari denied, 354 U.S. 923 8

O'Connor v. *O'Connell*, 253 F. 2d 365 ..... 9, 10

Statutes:

Internal Revenue Code of 1939:

Sec. 275 (26 U.S.C. 1952 ed., Sec. 275(a)) 2

Sec. 276 (26 U.S.C. 1952 ed., Sec. 276(a)) 2

Internal Revenue Code of 1954:

Sec. 6501 (26 U.S.C. 1958 ed., Sec. 6501) 2, 7

Sec. 7602 (26 U.S.C. 1958 ed., Sec. 7602) 3, 6, 9

Sec. 7604 (26 U.S.C. 1958 ed., Sec. 7604) 4, 5, 6

Miscellaneous:

United States Treasury Department, Internal Revenue Service Manual, Audit and Investigation Section, Part IV, Sec. 4031(3) 7

United States Treasury Department, Rules of Conduct for Employees of the Internal Revenue Service, Secs. 29, 35 7

540218 60

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OPINIONS BELOW

The opinion of the district court (R. 287–293) is reported at 171 F. Supp. 121. The opinion of the court of appeals (Pet. 15–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1959 (Pet. 15). The petition for a writ of certiorari was filed on January 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a summons issued under Section 7602 of the 1954 Code, for the statutory purpose of ascertaining the correctness of certain returns filed by the taxpayer corporation, is invalid because a concomitant

purpose of the investigation was the discovery of irregularities on the part of the revenue agents who had previously examined and reported upon the returns.

2. Whether there was sufficient evidence presented at the enforcement hearing to support the district court's conclusion that there was probable cause for suspecting that the returns filed for the years 1952 through 1954 were fraudulent.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 6501.[1] LIMITATIONS ON ASSESSMENT AND COLLECTION.
>
> (a) [as amended by Sec. 165(a), Act of September 2, 1958, 72 Stat. 1313] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
>
> * * * * *
>
> (c) *Exceptions.*—
>
> (1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax,

[1] Sections 275(a) and 276(a) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 275(a) and 276(a)) contain substantially similar provisions.

the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax.*—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U.S.C. 1958 ed., Sec. 6501)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and

to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1958 ed., Sec. 7602)

SEC. 7604. ENFORCEMENT OF SUMMONS.

* * * * *

(b) [as amended by Sec. 4(i), Act of April 2, 1956, c. 160, 466, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374, 387] *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner, shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7604)

STATEMENT

This case involves the enforcement, under Section 7604 of the Internal Revenue Code of 1954, of an internal revenue summons requiring petitioner, the treasurer of the taxpayer (a corporation engaged in the loan business), to testify and to produce certain records germane to the corporation's tax liabilities for the fiscal years 1952 to 1955 (R. 4–5, 15, 291). The corporation's returns for the fiscal years 1952 and 1953 were examined by one revenue agent; its returns for the fiscal years 1954 and 1955 were examined by another. The agents submitted their audit reports in September 1954 and July 1956, respectively (R. 71, 74).

Subsequent to these examinations, the Regional Inspector (concerned with the operating practices and the security and integrity of the Internal Revenue Service in his area, and operating independently of the Regional Commissioner) and the Regional Commissioner (concerned primarily with the determination and collection of taxes in his area) undertook a joint investigation into alleged collusion between taxpayers and revenue agents in the area of Fall River, Massachusetts (R. 287–288). That investigation disclosed close personal and business relationships between petitioner and the agents who had examined the taxpayer-corporation's returns for the years involved. More particularly, prior, during, and subsequent to his audit, the agent who had examined the taxpayer's returns for 1952 and 1953 had negotiated for himself and members of his immediate family several unsecured loans from the taxpayer amounting to $11,000,

bearing no interest or interest at one-half of one per cent per month, and some of the taxpayer's cards recording the loans were marked "DND," standing for "do not dun" (R. 71–73, 291). It was further disclosed that petitioner had a long-standing personal relationship with the agent who had examined the taxpayer's returns for 1954 and 1955, that petitioner had negotiated an exchange of checks in the amount of $6,500 for the agent's minor son, that he had served as an accommodation party in a real estate transaction entered into on behalf of members of the agent's family pending the outcome of a lawsuit, and that he had served as an officer of the agent's family corporation. Petitioner admitted during the investigation that he had made loans to the revenue agents at favorable rates, that he had encouraged good relations with them, and that he had had frequent social meetings with them, including drinks at cafes two or three times a week (R. 74–75, 291–292).

On the basis of the disclosures resulting from the joint investigation, the Regional Commissioner notified the taxpayer-corporation on May 20, 1958, that an additional inspection of its books for the years 1952 to 1955, inclusive, was necessary (R. 254). Shortly thereafter, a summons was issued under Section 7602 of the 1954 Code, *supra*, pp. 3–4, to produce certain books and records (R. 4–5), but petitioner refused to obey it (R. 6).

The Internal Revenue Service petitioned the District Court for the District of Massachusetts for an order under Section 7604 of the 1954 Code, *supra*, p. 4, compelling petitioner to comply with the summons.

After a hearing, the district court issued an order enforcing the summons (R. 293–294). The district court first found that the summons was issued not only in the interest of the Inspection Service to disclose the misfeasance on the part of the agents who examined the returns, but also as a result of a bona fide desire of the Regional Commissioner to ascertain taxpayer's tax liability (R. 288–289). Second, the district court held that, although three of the four tax years here involved were closed by the three-year statute of limitations to the assessment of any tax except for fraud (Section 6501 of the 1954 Code, *supra*, pp. 2–3), "serious improprieties" were reasonably suggested by a "situation where a taxpayer unduly cultivates agents, and agents find the advantages such to warrant deliberate infractions of instructions * * *"[2] (R. 289, 293). Therefore, the court concluded that the Commissioner's suspicions of fraud were "reasonable, and that he has shown probable cause to require the respondent to obey the summons with respect to the closed years." (R. 293).

[2] More specifically, the court found that, under the applicable regulations, the agents who had examined the taxpayer's returns should have recused themselves because of the extent of their relationship with the taxpayer, and that, by their willingness to work on the taxpayer's returns, the agents had risked disciplinary action or dismissal from the Service (R. 292–293). See United States Treasury Department, Internal Revenue Service Manual, Audit and Investigation Section, Part IV, Sec. 4031(3) (indebtedness to taxpayer, or business or social relationships); United States Treasury Department, Rules of Conduct for Employees of the Internal Revenue Service, Secs. 29, 35 (business and financial transactions, and receipt of favors).

Petitioner appealed from the order of the district court enforcing the summons, and the court of appeals affirmed (Pet. 15–22).

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 7–8) that the summons issued in this case was invalid because used "for a purpose other than that set forth in the statute." Section 7602 of the Internal Revenue Code of 1954, *supra*, pp. 3–4, authorizes use of the summons power for the broad and unrestricted "purpose of ascertaining the correctness of any return" filed. The district court found (and the court of appeals concurred (Pet. 19)) that the Commissioner's purpose in forwarding the so-called reopening letter and in issuing the summons in question "included a bona fide desire to ascertain the correctness of [taxpayer's] returns in connection with [taxpayer's] tax liability" (R. 288–289). The statutory purpose was thus fulfilled.

Petitioner suggests that Section 7602 should be read as requiring that the "purpose of ascertaining the correctness of any return" be the sole or primary one. The statute, however, makes no such requirement. *Boren* v. *Tucker*, 239 F. 2d 767, 772–773, (C.A. 9); cf. *Brody* v. *United States*, 243 F. 2d 378, 384 (C.A. 1), certiorari denied, 354 U.S. 923. In any event, the record does not support petitioner's claim (Pet. 2) that "the real purpose" in issuing the summons was "to investigate the conduct of" the agents, and that the purpose of ascertaining the correctness of the returns was merely "subsidiary." The district court found, to the

contrary, that, although the Regional Inspector initiated the investigation, the two purposes existed concurrently: "[t]he very circumstances which excited the interest of the Regional Inspector here were of equal concern to the Regional Commissioner" (R. 288). And the court of appeals, in agreeing, concluded that the concomitance of the two purposes was "inconsequential" (Pet. 20).

2. Contrary to petitioner's contention (Pet. 8–11), the evidence adduced at the enforcement hearing (*supra*, pp. 5–6; R. 71–76, 81–88, 148–160, 191–207) amply supported the conclusion of both courts below (R. 293; Pet. 22) that there was a reasonable basis for suspecting fraud. The court of appeals succinctly characterized that evidence as follows: "Certainly an ulterior tax motive leading to a reasonable suspicion of fraud may be inferred from the evidence of the respondent's business and personal intimacy with the agents who audited the taxpayer's returns" (Pet. 22).

Petitioner claims (Pet. 8–10) that conflicting criteria are used by different Circuits for enforcement of a summons issued under Section 7602 and that here the district court acted as "a mere rubber stamp"

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[3] The court of appeals, like the district court, used "probable cause," on the one hand, and "reasonable grounds" or "reasonable suspicion," on the other, interchangeably. Thus, the court of appeals stated that the phrases were "substantially synonymous" and that the proper test was the same as would be applied "in deciding whether an arrest by an officer without a warrant * * * complied with constitutional or statutory requirements" (Pet. 21). See also *O'Connor* v. *O'Connell*, 255 F. 2d 365, 370 (C.A. 1).

(Pet. 10) for the views of Government officials. But there can be no doubt in the instant case that the evidence satisfied *both* the Commissioner and the district court that there was probable cause for suspecting fraud (R. 293; Pet. 20–22). Similarly, the court of appeals, adhering to its earlier decision in *O'Connor* v. *O'Connell*, 253 F. 2d 365, 370 (C.A. 1), also required that the Government show probable cause—the stricter of the standards which petitioner contends (Pet. 8–10) have been applied by the various Circuits. Since both of the courts below thoroughly considered the evidence in applying the stricter standard, petitioner's discussion concerning the alleged conflicting criteria for enforcement of a summons is, at best, of merely academic interest in this case.

CONCLUSION

The judgment below is correct, no conflict of decisions is presented, and there is no warrant for further review of this case by this Court.

Respectfully submitted.

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